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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5146

DAVID RAWLINGS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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DAVID RAWLINGS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Appendix hereinafter designated App., pp. 76-83) is reported as *Rawlings* v. *Commonwealth,* Ky., 581 S. W. 2d 348 (1979). The opinion of the Court of Appeals of Kentucky (App., pp. 61-67) is not reported.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 1, 1979. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on May 22, 1979 (App., p. 84). The petition for

writ of certiorari was granted on December 10, 1979 (App., p. 85). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I. Whether the petitioner had reasonable expectation of privacy in the area searched or the contraband seized, and whether the search and seizure infringed any privacy interest of the petitioner which the Fourth Amendment was designed to protect?

II. Whether petitioner's detention while a search warrant was obtained was a violation of his rights under the 4th and 14th Amendments to the Federal Constitution?

III. Whether the search of the purse of Vanessa Cox was an infringement of her legitimate expectation of privacy interest?

IV. Whether petitioner's arrest and subsequent search were a violation of his 4th and 14th Amendment rights?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions petitioner has invoked are the Fourth and Fourteenth Amendments to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

As a part of a large scale roundup of indicted drug offenders police officers went to the rented residence of Lawrence Marquess on October 18, 1976. The police had an arrest warrant for Mr. Marquess based on an indictment for trafficking in LSD (App., p. 30; T.E., pp. 132-134).

When the police arrived at the house, Mr. Dennis Saddler, another resident of the house, testified that petitioner went to the door to answer it. The front door, according to Mr. Saddler, had not been opened while he lived there. While Saddler was not sure of how the police did get in the door, he is sure that neither the main entry door or outer screen door were broken (T.E., pp. 106-108).

Immediately prior to the police announcement at the front door, petitioner had brought out a green bank bag and dumped its contents into the purse of Mrs. Cox (T.E., pp. 12-13; App., p. 51). *Mrs. Cox told petitioner to remove the stuff from her purse and petitioner agreed that he would* (T.E., pp. 13-14). The police arrived at the front door not more than two or three minutes after petitioner had placed the drugs in the purse (App., p. 51; T.E., p. 34).

When the police entered the house they were told that the subject named in the search warrant was not present (App., p. 31). However, five other persons were present. These five included a resident of the house, Dennis Saddler, Vanessa Cox, the petitioner and two other transients (App., p. 31). The two transients (Linda Braden and Keith Northern) had been stopped

from leaving through the back door by officers who had gone to the back prior to the announcement at the front door (T.E., p. 193). A walk-through search confirmed Marquess' absence (App., p. 31). However, during the walk-through Officer Railey observed what appeared to be marijuana seeds and a rifle (App., p. 31). He also observed the distinctive aroma of marijuana smoke throughout the house (T.E., p. 135). As a result of these observations it was decided within two or three minutes to obtain a search warrant (T.E., pp. 136, 173). Officers Railey and Bruce left to get the warrant and the remaining officers detained the individuals in the house (App., p. 45). The five were informed that they would be permitted to leave if they submitted to a search (App., p. 46). Two of them did so and departed (App., p. 46). No interrogation or any other form of intrusion was made on those who did not submit to a search (App., p. 45). Some 30 minutes later the officers returned with a search warrant (App., pp. 32, 46). After reading the warrant, the search started with Mrs. Cox's purse (App., p. 32). When the purse was emptied, a large quantity of LSD and other drugs was found (App., p. 33).

Petitioner made no statement when the purse was emptied, but when Mrs. Cox looked at him and told him to take what was his, petitioner reached over and got the drugs (T.E., pp. 28-29). After this act petitioner was asked if the drugs were his and he so acknowledged (T.E., p. 31). Following this admission petitioner was patted down and the money and knife were found and petitioner arrested (T.E., p. 46).

At a suppression hearing, petitioner admitted placing the drugs in Mrs. Cox's purse (App., p. 42). In response to his counsel's question, *petitioner admitted he did not expect the purse to be free from intrusion nor that it was to be private* (App., pp. 42-43) *for his possessions.*

After his motions to suppress were overruled, petitioner on his motion was tried without a jury (App., pp. 12-13). Contrary to his plea of not guilty, he was found quilty and sentenced to five years confinement (App., p. 22). Both the Court of Appeals of Kentucky and the Supreme Court of Kentucky affirmed the conviction before this Court granted certiorari.

SUMMARY OF ARGUMENT

I

The "automatic standing" concept of *Jones* v. *United States,* 362 U. S. 257 (1960) is no longer necessary in view of *Simmons* v. *United States,* 390 U. S. 377 (1968) and *Rakas* v. *Illinois,* 439 U. S. 128 (1978). *Jones* created "automatic standing" in two situations (1) for those individuals legitimately on the premises during the search and (2) for those individuals where possession of that which was seized was an essential element of the crime charged. This concept permitted individuals to vicariously assert a violation of another's Fourth Amendment rights.

Simmons, supra, removed one of the apparent necessities when it was held that evidence given in a suppression hearing could not be introduced later on the issue of guilt. *Rakas, supra,* struck down the "legiti-

mately on the premise" concept and in so doing abandoned the property concept of standing by placing the analysis under the heading of substantive Fourth Amendment doctrine.

Application of the substantive Fourth Amendment right of reasonable expectation of privacy to the remaining aspect of the *Jones* case results in the conclusion that "automatic standing" in possession cases is no longer necessary. This is because the abandonment of the property concept eliminates the evil of the prosecution on suppression arguing against "possession" and at trial arguing the "possession" for guilt. Under *Rakas,* the government may now argue against any reasonable expectation of privacy at suppression and argue possession at trial without any real or imagined conflict of positions which detract from the orderly administration of justice.

II

The detention of petitioner for a short time interval while a search warrant was obtained did not constitute an unreasonable seizure. The fact that there was probable cause to obtain a search warrant was not diminished by the fact that state law did not permit an arrest for a misdemeanor on probable cause. Nor does the fact the search warrant which was obtained later proved defective as to petitioner make the initial detention illegal.

Assuming *arguendo* the detention was illegal, application of the exclusionary rule does not rule out the evidence sought to be suppressed since it was either not used against him or was not the result of police conduct.

III

The Commonwealth admits that in view of *Ybarra* v. *Illinois,* —— U. S. —— the search of the purse belonging to Vanessa Cox was an unlawful intrusion, but that petitioner lacked a sufficiently reasonable expectation of privacy to receive the benefits of the exclusionary rule.

IV

The legality of petitioner's detention has no effect on his arrest and incidental search. The admission of guilt in response to a plea from a non-official acquaintance was an intervening factor sufficient to remove the taint of any illegal detention. The Commonwealth responds to the legality of the detention in Argument II, *supra.*

ARGUMENT

I.

THE PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED OR THE CONTRABAND SEIZED, THEREFORE THE SEARCH AND SEIZURE DID NOT INFRINGE ANY PRIVACY INTEREST OF THE PETITIONER WHICH THE FOURTH AMENDMENT WAS DESIGNED TO PROTECT.

The Fourth Amendment to the United States Constitution insures that the citizens of this country will be protected from illegal search and seizures. The core value protected by the Fourth Amendment is privacy, more specifically, the privacy of the individual against impermissible governmental intrusion. In order to

protect the citizenry against impermissible searches and seizures this Court established an exclusionary rule which prohibits the introduction of evidence seized in violation of the Fourth Amendment from being introduced into evidence at trial. *Weeks* v. *United States,* 232 U. S. 383 (1914); *Mapp* v. *Ohio,* 367 U. S. 643 (1961). The primary purpose of the exclusionary rule is to act as a deterrent against impermissible police activities in conducting searches and seizures. However, since the creation of the exclusionary rule this Court, as well as numerous state and federal courts, has continually been confronted with the necessity of balancing the competing considerations of effectuating Fourth Amendment protections on the one hand with the cost to society on the other in permitting the criminal to go free. This balancing of competing interests has been brought more clearly into focus in the last twenty years as a consequence of the approach to be taken in determining whether one has been a victim of an illegal search and seizure.

Historically, an accused could make such a claim only if he alleged and established that he had a possessory or proprietary interest in the premises searched or the object seized. In other words, he first had to establish that he had "standing" to raise constitutional issue of an alleged illegal search and seizure. And, necessarily, this concept of "standing" became immersed in the subtleties of real and personal property law. As a consequence of the significance of property law concepts in determining whether one had "standing," courts throughout the country on both the

state and federal levels became mired in a morass of often conflicting opinions as to "standing." Permitting property concepts to be, in effect, determinative of Fourth Amendment rights proved unsatisfactory because it ignored the true issue of whether one's right to privacy had been violated. *An interest in property did not necessarily indicate an interest in privacy.*

Moreover, the analysis and resolution of "standing" questions was further complicated in criminal cases where the offense charged included "possession" as a critical element of the crime itself. In such cases the accused found himself on the horns of a dilemma since in order to have "standing" to attack an allegedly illegal search and seizure he would have to claim "possession" of the item seized, yet at trial he had to deny "possession" in order to escape prosecution on the possessory offense. The government on the other hand was given the benefit of a self-contradictory position in that it could charge the accused with "possession" of the illegal property for purposes of the offense charged yet argue in a pre-trial hearing on a motion to suppress that the accused had no "standing" to attack the search and seizure because he did not have "possession" of the illegal property.

In *Jones* v. *United States,* 362 U. S. 257 (1960) this Court attempted to resolve the quandry presented in possessory offense cases by creating "automatic standing" (a) where possession at the time of the contested search and seizure was an essential element of the offense charged, and (b) to anyone legitimately on

premises[1] where a search occurred. The purpose of the *Jones* decision was to eliminate (1) the *self-incrimination dilemma* of the accused in such cases and (2) to prevent the government taking advantage of *self-contradictory positions.* However, it would appear over the past twenty years that the "cure" created in the *Jones* case has been found to be a great deal worse than the disease it was intended to eradicate. As a consequence of the nearly total abandonment in possessory offense cases of the pre-1960 standing concepts grounded on property law, imperfect as they were, and permitting automatic standing, the scope of Fourth Amendment protections was improperly broadened to include those individuals who otherwise would never have had access to such constitutional protections because they had no substantive Fourth Amendment right to privacy abridged.

Since the *Jones* decision, and more particularly since 1967, it would appear that this Court's approach to what has been the traditional doctrine of standing[2] in search and seizure cases has gradually been diminished in favor of a doctrine predicated upon the right to personal privacy from governmental intrusion protected under the Fourth Amendment, privacy being a core value to be protected as a matter of substantive

[1]". . . property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable." *Rakas* v. *Illinois, supra,* at 153. Also see *Alderman* v. *United States,* 394 U. S. 165 (1969).

[2]Either automatic standing, as in Jones, or actual standing predicated upon property concepts as in pre-Jones cases.

Fourth Amendment law. "A Person Aggrieved": *Standing to Suppress Illegally Seized Evidence in Transition,* Gutterman, 23 Emory Law Journal 111 (1974). For example, in *Katz* v. *United States,* 389 U. S. 347 (1967) this Court resolved a Fourth Amendment search and seizure issue by utilizing the *privacy approach* in determining whether Fourth Amendment protections did or did not apply in an electronic eavesdropping case implicitly rejecting the property approach. In resolving another Fourth Amendment search and seizure issue in *Mancusi* v. *DeForte,* 392 U. S. 364 (1968) this Court acknowledged that although the accused had standing under the *Jones* doctrine of "legitimately on the premises" test, the holding appeared to be based on the privacy concept previously announced in the *Katz* case.

This slowly emerging transition by the Court from the traditional concept of *standing* whether "actual" or "automatic" to the more recent approach of "expectation of privacy" has perhaps reached maturity in the recent decision of *Rakas* v. *Illinois,* 439 U. S. 128 (1978) wherein this Court abandoned the "standing" concept in favor of an analysis of search and seizure claims by an examination of the "expectation of privacy" the allegedly offended individual has in the place searched or the objects seized. Although this Court recognized that property rights reflect society's recognition of an individual's authority to act with respect to certain things and areas and should therefore be given some consideration, the scope of the Fourth Amendment must be determined by the degree of pri-

vacy that a free people may legitimately expect. *Rakas* v. *Illinois, supra,* at 151. Thus, this Court concluded in effect that property rights cannot support a Fourth Amendment claim *in the absence of a reasonable expectation of privacy in the property in question.* Conceptually, the issue is not one of traditional standing but more properly a substantive question of whether an accused's Fourth Amendment rights were violated by the search. The test under *Rakas* is, (1) whether the accused personally had, under substantive Fourth Amendment law, an interest in privacy protected by the Fourth Amendment, and (2) whether that interest in privacy has been infringed by the challenged search and seizure.

The transition from the old standing doctrine, predicated upon property law principles, and the subsequent automatic-standing doctrine which arose from the quandry presented by property standing considerations in possessory offense cases, to the present "expectation of privacy" doctrine is of significance to the case at bar. As previously noted, the protections accorded under the Fourth Amendment evolved from the concept of individual privacy and are necessarily unique and personal to the individual. The property considerations employed in pre-*Jones* cases in determining standing would not necessarily guarantee that the individual who had a possessory or proprietary right in a place or thing also had an interest in privacy protected under the Fourth Amendment. Nor did the pre-*Jones* standing doctrine provide an avenue for relief to the person whose substantive Fourth Amend-

ment interest or right to privacy had been violated if he were unable to establish that he had either a possessory or proprietary right in the place searched or the thing seized.

Nor did *Jones* v. *United States, supra,* prove any more helpful in possessory offense cases because it was assumed legally that one had "standing," and this assumption was based totally upon circumstances which might have no relevance at all to any substantive Fourth Amendment consideration. In fact, the *effect* of *Jones* all too often was not merely to assume the accused had automatic "standing" in possessory offense cases, but that this "standing" somehow also established a Fourth Amendment violation. These inconsistencies in determining Fourth Amendment rights in search and seizure cases required a new approach.

The expectation of privacy doctrine represents a realistic and flexible standard of societal norms in determining the scope of the protections accorded under the Fourth Amendment. Under this new expectation of privacy concept a possessory or proprietary interest may or may not be a factor to consider in resolving the substantive constitutional issue under the Fourth Amendment, depending upon the circumstances.[3] No single factor is determinative in the resolution of whether one has a reasonable expectation of privacy. Such a determination would depend upon several factors including, (1) the nature of the premises or activity, (2) the extent of personal interest in the premises, (3) the steps taken by the individual to

[3] *Rakas* v. *Illinois, supra,* n.8.

maintain privacy of the area or activity, and (4) society's characterization of the place and activity. It is the privacy doctrine upon which the respondent shall rely in resolving the primary issue before this Court—did the search of Vanessa Cox's purse violate the petitioner's rights under the Fourth Amendment?

A.

Jones v. *United States*, 362 U. S. 257 (1960) May Not Be Relied Upon by the Petitioner as Giving Him Automatic Standing to Challenge the Search of Vanessa Cox's Purse.

In *Rakas* v. *Illinois*, 439 U. S., at 128 n.4 and *Brown* v. *United States*, 411 U. S., at 228, this Court reserved the issue of whether the "automatic standing" rule enunciated in *Jones* v. *United States*, 362 U. S. 257 (1960) survives this Court's decision in *Simmons* v. *United States*, 390 U. S. 377 (1968). That question was specifically reserved for a case, such as the one at bar, where possession at the time of the challenged search and seizure is an essential element of the offense charged. The respondent submits that the time has now come for this Court to hold that the "automatic standing" rule, in light of *Simmons* v. *United States* and *Rakas* v. *Illinois*, ceases to exist in possessory offense cases.

The purpose for the *Jones* v. *United States* decision was to:

(1) eliminate the self incrimination dilemma confronted by the accused who found himself in the position of having to assert a possessory or proprietary

interest in the property to establish "standing" and subsequently having to deny such a proprietary or possessory interest at the trial on the merits of the possessory offense charge, and also (2) the vice of prosecutorial self-contradiction, that is, allowing the government to allege possession as part of the offense charged and yet deny that there was possession sufficient for "standing" purposes.

The respondent will now show that neither of these two underpinnings of the *Jones* decision reflect a viable basis for the continuation of the automatic standing doctrine.

(1) THE DILEMMA OF SELF-INCRIMINATION.

To a large extent the self-incrimination dilemma found in *Jones* was resolved by this Court in its holding in *Simmons* v. *United States* wherein it was held that the testimony of an accused in support of a motion to suppress evidence on Fourth Amendment grounds could not subsequently be used against him "on the issue of guilt" upon proper objection. *Simmons* v. *United States*, 390 U. S., at 394. Thus, the self-incrimination dilemma, at least insofar as such testimony goes to "the issue of guilt," is no longer a consideration as it was in *Jones*. However, *Simmons* did not prohibit the use of such pre-trial testimony for *all purposes*.

The respondent will now address those other aspects of self-incrimination which according to the petitioner render *Simmons* v. *United States, supra,* ineffective in protecting the accused in possessory offense cases from the dilemma of self-incrimination.

a.

The Threat of Impeachment.

The petitioner argues that though *Simmons* v. *United States* eliminates the use of pre-trial testimony insofar as it goes to the issue of guilt, the accused is still confronted with various other aspects of self-incrimination by the use of such pre-trial testimony as would require extending the constitutional umbrella of protection. For example, he raises the specter of the threat of being impeached at trial by the testimony he had previously given at the suppression hearing. Petitioner points out that in Fifth Amendment cases this Court has held that an accused's statements which are otherwise inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436 (1966) are admissible at trial for impeachment purposes. *Harris* v. *New York,* 401 U. S. 222 (1971). The petitioner concludes that the impeachment aspect of such testimony presents great concern because this Court previously indicated that the privacy approach it is now taking in Fourth Amendment cases has already been employed with respect to the Fifth Amendment privilege in self-incrimination cases.[4]

It is the position of the respondent that the possible subsequent introduction of suppression hearing testimony at the trial on the merits for impeachment pur-

[4]In *United States* v. *Kahan,* 415 U. S. 239, 243 (1974) this Court acknowledged that although *Simmons* barred the use of pre-trial testimony at trial to prove its incriminating *content,* such testimony is admissible when the incriminating nature of the pre-trial statements derive not from their content but from the accused's knowledge of their *falsity.*

poses does not present a problem of overriding constitutional concern. This Court has never held that unlawfully seized evidence is inadmissible in all proceedings or against all persons. *Rakas* v. *Illinois,* 439 U. S. at 134. *United States* v. *Ceccolini,* 435 U. S. 268, 275 (1978); *Stone* v. *Powell,* 428 U. S. 465, 486 (1976); *United States* v. *Calandra,* 414 U. S. 338, 348 (1974). The exclusionary rule came into existence as an attempt by this Court to give vitality to the Fourth Amendment. The prime purpose of the exclusionary rule, "if not the sole one," is to deter future unlawful police conduct. *United States* v. *Janis,* 428 U. S. 433 (1976). However, the application of the exclusionary rule has been restricted to those areas where its' remedial objectives are believed to be "most efficaciously served." *United States* v. *Calandra,* 414 U. S. at 348 (where otherwise inadmissible evidence could be shown to a grand jury).

Accordingly, whether the possible introduction of such prior testimony at the trial on the merits for impeachment is justified constitutionally must be resolved by "balancing the interests'"[5] between detering illegal police conduct on the one hand, and the social cost of excluding otherwise relevant evidence in a criminal prosecution. In *Harris* v. *New York, supra,* this Court resolved such an issue, within the context of the Fifth Amendment, by finding that "sufficient de-

[5]Petitioner's reliance on *New Jersey* v. *Portash,* ____ U. S. ____, 99 S. Ct. 1291 (1979) in support of his contention that the "balancing of interests" formula is "impermissible" here, is misplaced. The case *sub judice,* unlike *Portash* does not involve the use of compelled testimony.

terrance flows when the evidence in question is made unavailable to the prosecution *in its case in chief.*" (Emphasis ours). 401 U. S., at 225. The respondent submits that the reasoning employed by this Court in *Harris* v. *New York* is likewise both analogous and appropriate to the resolution of this similar issue within the context of the Fourth Amendment. After all, the petitioner should not be allowed to turn to his own advantage the perhaps unlawful manner by which the police acquired its evidence. *Walder* v. *United States,* 347 U. S. 62, 65 (1954). The respondent contends that the shield devised by this Court in *Simmons* v. *United States* was never intended to be so all-encompassing as urged by the petitioner.

On balance, the value to society and the criminal justice system of insuring against the occurrence of perjury in criminal cases demands the conclusion that an accused may be impeached by pre-trial statements he has made at a suppression hearing. To hold otherwise would give the accused, in criminal cases where possession is an essential element of the charged, carte blanche immunity from a traditional truth-testing device of the adversary system.[6] Moreover, such a holding would also effectively result in a broad brush extension, even though tangentially, of the exclusionary rule and such extensions have been looked upon with extreme caution by this Court, *Alderman* v. *United States,* 394 U. S. 165, 175 (1969). Thus, the alleged

[6]The respondent would submit that there would be few if any cases arising wherein pre-trial testimony of the accused, within the context used here, would be introduced at trial other than have impeachment purposes as previously set out in Part A.

threat of impeachment constitutes no threat whatsoever in the constitutional sense to the rights of the petitioner under the Fourth Amendment.

b.

The Threat of Substantive Use of Prior Inconsistent Statements.

The petition also directs the Court's attention to yet another "aspect of self-incrimination to which a criminal accused might be susceptible, the threat of the substantive use of prior inconsistent statements. Petitioner points out that such statements are admissible under Kentucky law as substantive evidence which may be admitted through the testimony of another witness, and would not be limited to impeachment purposes. *Jett* v. *Commonwealth,* Ky., 436 S. W. 2d 788, 792 (1969). He concludes that such evidence is yet another example of how the accused may be exposed to the self-incrimination dilemma despite the holding of *Simmons* v. *United States, supra.*

However, the need for a deterrent against improper police action in the search of a premises or the seizure of property against the dictates of the Fourth Amendment does not require that that deterrent be absolute. The use of the exclusionary rule in effectuating the protections of the Fourth Amendment need and, indeed, should not go to extremes. The possibility, or threat, that substantive use of prior inconsistent statements of the accused is, on balance, of no substantial constitutional significance when weighed against the negative effects against society that an expansion of the

exclusionary rule doctrine would have. The cost to society which would be extracted in terms of injustice would be far too great a burden.

The respondent submits that limiting instructions to the jurors with reference to the manner in which an accused's prior inconsistent statements at a suppression hearing were to be used would be constitutionally sufficient, if necessary at all, to protect the accused's rights. Again, the fact that pre-trial testimony could not be used against the accused "as to the issue of guilt" constitutes sufficient deterrence. No extension of the exclusionary rule is constitutionally required to guarantee the vitality of the Fourth Amendment.

c.

The Threat of a Prosecutorial "Fishing Expedition."

The final "aspect" of self-incrimination faced by an accused is the threat of a prosecutorial "fishing expedition" wherein the government at a suppression hearing may attempt to extricate incriminating information from the accused. Petitioner argues that at such a hearing the government may attempt to elicit testimony from the accused which would generate investigative leads to enhance the prosecution's case or to produce new and perhaps related charges against the accused.

Again, the respondent is constrained to point out that the decision in *Simmons* v. *United States, supra,* goes no further but to the limit the use of such testimony only as it goes to the accused's guilt or innocence on the merits at the trial. This, and this alone, is a

sufficient deterrent to impermissible police conduct under the Fourth Amendment. The fact that the prosecution may elicit at the suppression hearing some bit of information from the accused which might further incriminate him on the offenses with which he stands charged, or generate other related charges against him, is simply a valid part of the adversarial process in the criminal justice system. If the petitioner's reasoning were carried to its logical end nothing that the accused in a criminal case might say which could possibly subsequently incriminate him could ever be used. Again, such a result is absurd and serves neither the purposes of the Fourth Amendment, the exclusionary rule, the criminal justice system, or society as a whole.

(2) PROSECUTORIAL SELF-CONTRADICTION.

It is the position of the respondent that the second underpinning for *Jones* v. *United States,* prosecutorial self-contradiction, on longer presents a legally sufficient cause to perpetrate the automatic standing doctrine. The *Jones* decision was the result of the head on collision which occurred when the traditional standing doctrine, which was predicated on property law concepts, was applied to criminal cases wherein the essention element of the offense charged is possession. The resulting legal enigma was two-fold: (1) the dilemma of self-incrimination faced by the accused and (2) the dilemma of prosecutorial self-contradiction. The respondent has previously shown that the self-incrimination dilemma has been resolved by the application of *Simmons* v. *United States.* We will now undertake

to establish that application of the expectation of privacy doctrine eliminates the dilemma of prosecutorial self-incrimination.

The respondent submits that the newly evolved "expectation of privacy" doctrine eliminates the problem of prosecutorial self-contradiction which previously existed under the earlier property standing concepts. Since *Rakas* the dilemma of prosecutorial self-contradiction no longer exists because now the government can maintain at trial that the accused had lawful "possession" of the property at the time of the search, yet at the suppression hearing the government can argue that the accused had *no legitimate expectation of privacy* in either the search or the seizure. No inconsistency arises from these two positions. The government is no longer saddled with the inconsistent positions of arguing "possession" by the accused for standing purposes. This is so because the expectation of privacy doctrine eliminates possessory and proprietary interests as the *sine qua non* which was previously necessary to establish the right to Fourth Amendment protections. Now, in light of *Rakas* v. *Illinois, supra,* and *Katz* v. *United States, supra,* only reasonable and legitimate expectations of privacy are protected under the Fourth Amendment. *Rakas,* 439 U. S., at 151 (Powell, J., Concurring). Possession merely constituites a factor to be considered and weighed in the totality of the circumstances in resolving whether a legitimate and reasonable expectation of privacy has been violated under the Fourth Amendment.

In summary the respondent submits that the rationale of the "automatic standing" rule enunciated in *Jones* v. *United States, supra,* fails to survive this Court's subsequent decisions in *Simmons* v. *United States, supra,* and *Rakas* v. *Illinois, supra.* This is true regardless of whether the offense charged is possessory or non-possessory in nature. The self-incrimination dilemma, of concern in *Jones,* is resolved by *Simmons* which prohibits the use of the accused's pre-trial testimony as evidence on the issue of guilt at trial. And, the "expectation of privacy" doctrine as set out in *Rakas* v. *Illinois, supra,* eliminates the problem of prosecutorial self-contradiction. Accordingly, since the reasons for the automatic standing rule cease to exist, so should the rule itself.

B.

Petitioner's Mere Claim of Ownership of the Items Seized Does Not Resolve the Issue of Whether He Had a Reasonable Expectation of Privacy in Either the Items Seized or the Area Searched.

The petitioner persists in his argument as to"standing." He maintains that he has actual standing to raise the issue of the alleged illegal search and seizure because after Mrs. Cox's purse was searched he admitted ownership of the drugs found therein. He now maintains that this mere claim of ownership in the contraband is sufficient, in and of itself, to give him "standing" to raise the Fourth Amendment issue. The respondent respectfully disagrees.

It would appear from the petitioner's brief that he has failed to grasp the fact that this Court in *Rakas* v. *Illinois, supra,* abandoned the proposition that possessory or proprietary interests in property are *in and of themselves* determinative of one's rights under the Fourth Amendment to the United States Constitution.[7] First, it must be recognized that in *Rakas* v. *Illionis, supra,* this Court clearly and unequivocally rejected the concept of "standing" as being an imperfect method by which to resolve Fourth Amendment search and seizure questions. Thus, consideration of whether petitioner had "standing" is totally irrelevant, regardless of his possessory interest in the drugs.

Secondly, the petitioner's allegation of ownership of the contraband[8] seized is merely a factor to be considered in determining whether he had a reasonable and legitimate expectation of privacy in the contraband or in the area searched. This Court recognized that property rights reflect society's explicit recognition of a person's authority to act in certain areas and therefore should be *considered* in determining whether an individual's expectations of privacy are reasonable. *Rakas* v. *Illinois,* 439 U. S., at 153; *Alder-*

[7]An address book allegedly belonging to the petitioner was also seized when, Mrs. Cox emptied her purse. However, there is nothing in the record to indicate that this particular item, which was not contraband, incriminated petitioner in any manner whatsoever.[1] The "legitimately on premises" doctrine had been abandoned by this Court in *Rakas* v. *Illinois,* 439 U. S. 128 (1978).

[8]The importance of the property interest to standing took on such significance and became so intertwined with Fourth Amendment claims that many courts came to the conclusion, incorrectly, that if one had a property interest violated he also had a viable Fourth Amendment violation.

man v. *United States,* 394 U. S. 165 (1969). Thus, the more traditional property rights rationale may be employed under the expectation of privacy doctrine because property concepts are to *some degree* societal recognitions of privacy expectations. *Rakas* v. *Illinois, supra,* at 144, n. 12.

However, it is submitted that under the expectation of privacy doctrine the mere claim of ownership in an item or a premises may not be sufficient to establish that a legitimate expectation of privacy exists with respect to a particular item seized or the premises searched. The resolution of such an issue would depend totally upon the particular facts and circumstances surrounding each case. After all, the scope of the Fourth Amendment must be determined by the scope of privacy that a free people legitimately may expect. Thus, for an expectation to deserve the protections of the Fourth Amendment it must be one that society is prepared to recognize as reasonable. *Katz* v. *United States, supra.*

Accordingly, petitioner's allegation of ownership of the contraband, by itself, is of no particular significance. Suffice it to say that the nature of petitioner's interest in the seized contraband, insofar as establishing "standing" is concerned, is irrelevant under the reasonable expectation of privacy doctrine since the concept of "standing" is no longer relevant in light of *Rakas* v. *Illinois, supra.*

C.

The Search of Mrs. Cox's Purse and the Subsequent Seizure of Contraband Therefrom Did Not Violate Any Reasonable Expectation of Privacy Interest of the Petitioner Which the Fourth Amendment Was Designed to Protect.

It would appear that the decision of this Court in *Rakas* v. *Illinois, supra,* sets forth the following two-pronged test which must be utilized in resolving Fourth Amendment search and seizure questions: (1) whether the accused personally had, under substantive Fourth Amendment law, an interest protected by the Fourth Amendment, and (2) whether that interest has been infringed by the allegedly objectionable search and seizure. The respondent submits that in this case the petitioner had no reasonable expectation of privacy in either the contraband seized or in the search of Mrs. Cox's purse.[9]

Here, the petitioner asked Mrs. Cox to keep the drugs in her purse, and he placed them there before she could respond (T.E., p. 13). Mrs. Cox did not want the drugs in her purse and did not give her permission to petitioner to place them there. In fact, as soon as petitioner had placed the drugs in her purse, she immediately asked him to remove them (T.E., pp. 13-14, 24). He agreed to do so momentarily but insisted that he first had to go to the bathroom. Before he returned the police had made their entry into the house. Twenty to forty-five minutes later when Mrs.

[9]See note 7, *supra.*

Cox emptied her purse at the direction of the police, she looked at petitioner and told him to "take what is yours" (T.E., pp. 144-149, 28-29). As petitioner took his drugs a policeman asked him if the drugs were his and petitioner admitted ownership (T.E., pp. 29-32). At the second suppression hearing petitioner admitted that he did not feel the drugs in the purse would be free from governmental intrusion (App., p. 48).

The above facts unequivocally establish that:

(1) petitioner had no actual (subjective) expectation of privacy in Mrs. Cox's purse,

(2) his alleged expectation of privacy is clearly unreasonable under given societal norms,

(3) the alleged possessory interest of petitioner was in contraband, and

(4) petitioner seeks to vicariously assert the Fourth Amendment rights of another.

First, it is clear under both *Rakas* v. *Illinois* and *Katz* v. *United States* that petitioner must have exhibited an actual expectation of privacy and it must be one that society is prepared to recognize as reasonable. The facts in this case unequivocally establish that petitioner neither had nor reasonably expected any "privacy" in placing the drugs in Mrs. Cox's purse.

Secondly, the respondent urges that even had the petitioner exhibited an actual expectation of privacy, such an expectation of privacy, predicated upon petitioner's claim of ownership of contraband, is not one that society would be prepared to recognize as reasonable. A realistic and flexible standard of societal norms must be employed in determining the scope of Fourth

Amendment protections. Is the keeping of illicit drugs (or any other contraband) realistically acceptable by society and thus "reasonable"? Respondent submits that it is not.

This Court has previously held that an accused has no protected interest in stolen property. *Brown* v. *United States,* 411 U. S. 223 (1973). The respondent urges this Court to hold that there is no constitutionally protected expectation of privacy interest in contraband. Or, alternatively, if an accused does have an interest in contraband said interest should be held to be of such minimal consideration for constitutional purposes as not to fall within the protections of the Fourth Amendment to the United States Constitution. To hold otherwise would permit an accused in a case such as this to successfully invoke the protections of the Fourth Amendment upon the sole ground of his personal claim of possession to illegal property which in itself is condemned under societal norms. Such a conclusion is not a reasonable one in terms of either simple logic or under societal norms. *Rakas* v. *Illinois,* 439 U. S., at 128. A mere assertion of a property interest cannot support a Fourth Amendment claim in the absence of a reasonable expectation of privacy, which as previously noted does not exist in this case. *United States* v. *Hunt,* 505 F. 2d 931, 937 (5th Cir. 1974). To permit an accused to invoke the protection of the Fourth Amendment by the mere assertion of ownership in contraband "creates too broad a guage for measurement of Fourth Amendment rights." Compare *Rakas* v. *Illinois,* 439 U. S., at 142. Thus,

the petitioner's expectations of privacy in the contraband itself is not a reasonable one.

Third, it is submitted that the petitioner cannot derivatively invoke any expectation of privacy that Mrs. Cox had in her purse. Fourth Amendment rights are personal in nature and cannot be vicariously asserted by third parties. *Alderman* v. *United States, supra.* In recent years this Court has appeared to consistently narrow the scope of application of the Fourth Amendment, and properly so, given the fact that "privacy" is the core value protected by that Amendment.

Finally, it should be noted that the application of the exclusionary rule has been limited to those areas where its remedial objective, deterence of police misconduct, is believed to be most efficaciously served. *United States* v. *Calandra,* 414 U. S. 338, 348 (1974). The factual circumstances of this case would serve to broaden the application of the exclusionary rule in criminal cases and such an extension would be contrary to the stance this Court has recently taken in both *Rakas* v. *Illinois, supra,* and *Alderman* v. *United States, supra.* The respondent submits that extending the benefits of the exclusionary rule to those such as the petitioner cannot be justified in light of the heavy toll such an extension would take against the public interest in prosecuting those accused of dealing in drugs and having them convicted on the basis of all the evidence which exposes the truth.

Under these circumstances the respondent submits that the search of Mrs. Cox's purse and the subsequent

seizure of contraband, belonging to petitioner, did not violate any reasonable expectation of privacy interest of the petitioner which the Fourth Amendment was designed to protect. Finally, to hold under the facts of this case, that petitioner's Fourth Amendment rights were violated would constitute an unconscionable extension of the exclusionary rule doctrine at the cost of the further encroachment on society's interest in convicting those who have violated its laws.

II.

PETITIONER'S DETENTION WHILE A SEARCH WARRANT WAS OBTAINED WAS NOT A VIOLATION OF HIS RIGHTS UNDER THE 4TH AND 14TH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Petitioner asserts that he has the right to challenge not only his own detention but the detention of Mrs. Cox as well. Respondent simply submits that petitioner cannot protest the legality of Mrs. Cox's detention. (See Argument I, *supra.*)

It is clear that the petitioner was detained without a warrant. It is equally as clear that the police officers intended to and thought they had obtained a warrant which would permit a search of the individuals.[10] This

[10]Q. What I was getting at was the reason for not getting a search warrant for these people just at the same time.

A. I didn't know that it didn't say persons on there. I thought it did. Probably a mistake on my part. (App. p. 39).

Q16. Now I believe Officer Railey testified here that when he went and got that warrant, he thought and intended that he would be permitted to search the persons when he returned. Is that your intention also in getting that warrant?

A. Yes sir.

(Footnote continued on following page)

temporary detention while a warrant was sought is not an intrusion of the types condemned by this Court in *Dunaway* v. *New York,* 442 U. S. —— (1979), *Davis* v. *Mississippi,* 394 U. S. 721 (1969), *Brown* v. *Illinois,* 422 U. S. 590 (1975) and *Ybarra* v. *Illinois,* —— U. S. —— (1979). Those cases of course involved either a search or a seizure without probable cause. The restraint in the case before the bar is nearer to the type of intrusion permitted in *Terry* v. *Ohio,* 392 U. S. 1 (1968), but is still different.

In the instant case probable cause existed to obtain a search warrant or to arrest if the suspected offense were a felony. The fact that state law did not permit an arrest for a misdemeanor on probable cause did not alter or remove the existence of probable cause. If there is probable cause to obtain a search warrant, then, given the mobility of the person or thing to be searched and the nature of the suspected offense, it would not be unreasonable to detain the person or the thing for a period of time until the warrant arrives. In *United States* v. *Van Leeuwen,* 397 U. S. 249 (1970) the detention of a piece of mail for a period of 29 hours in order to obtain a warrant was acceptable under the facts. Here the detention was 20-45 minutes,[11] which while it

Q17. To come back there and search the persons who were present there; is that correct

A. Yes sir, to search the persons in the house. (T.E. p. 183).

[11]The estimated times were:

Cox	45 minutes to an hour	T.E. pp. 27, 42
Saddler	20-30 minutes	T.E. pp. 113, 114
Officer Bivens	30 minutes	T.E. p. 154
Officer Railey	30-35 minutes	T.E. p. 137
Officer Wood	20-25 minutes	T.E. p. 202

was of people was nevertheless on balance reasonable. Cf. *United States* v. *Festa,* 190 F. Supp. 160 (Mass. 1969).

What should police do when they find themselves in this type situation? Are they powerless to take any steps to foreclose the risk a person may depart the premises? Should they shrug their shoulders and turn away? Prohibiting police officers from detaining for a reasonable time period in order to obtain a judicially granted search results in an unresolvable dilemma for the police. If they search without a warrant, it must be under one of the recognized exceptions permitting warrantless searches. On the other hand if they have probable cause to obtain a search warrant (and under the circumstances cannot arrest) but cannot restrict departure, then there is no point in getting the warrant since the individual will be gone long before the search warrant can be executed.

Assuming, *arguendo,* that petitioner's detention was illegal, the question is what, if anything, must be excluded. Petitioner would have the money, the knife and his acknowledgment as to the drugs all excluded.

The exclusionary rule applies only to evidence the police illegally obtained and which is used against the defendant. *United States* v. *Janis, supra.* In the case before the bar, the money was not introduced into evidence against the petitioner until the petitioner on cross-examination mentions the money (T.E., p. 60). Later a portion of the money was admitted into evidence (T.E., pp. 146-147). While the knife was mentioned by the government, it was never introduced

into evidence as it had been returned prior to trial to petitioner. It must be again pointed out that petitioner was tried before a judge without a jury and that the passing references to the money and knife would have little if any impact on the case.

Petitioner acknowledged the drugs were his, not as a result of any police interrogation, but rather from a strong request by the person left holding the bag that he take what was his (T.E., pp. 28-29). The Commonwealth would submit that this strong plea, given the circumstances surrounding the placement of the drugs to begin with (T.E., pp. 12-14), constituted a sufficient break in the causal connection between the detention and the statement. This, we submit, was sufficient attenuation of any taint. *United States* v. *Ceccolini,* 435 U. S. 268 (1977), *Dunaway* v. *New York,* 442 U. S. —— (1979).

III.

THE SEARCH OF THE PURSE OF VANESSA COX WAS AN INFRINGEMENT OF HER LEGITIMATE EXPECTATION OF PRIVACY INTEREST.

The Commonwealth admits, as it has all along that the search of Mrs. Cox's purse was a warrantless search. It would further appear that under *Ybarra* v. *Illinois,* —— U. S. ——, if Mrs. Cox were asserting her own 4th Amendment rights, that the exclusionary rule would apply. However, despite the apparent invasion of *her* expectation of privacy, the Commonwealth maintains that petitioner may not benefit therefrom. (See Argument I, *supra*).

IV.

PETITIONER'S ARREST AND SUBSEQUENT SEARCH WERE NOT A VIOLATION OF HIS 4TH AND 14TH AMENDMENT RIGHTS.

In response to petitioner's assertions in his final question the Commonwealth would simply state that if petitioner cannot assert an expectation of privacy in Mrs. Cox's purse (see Argument I, *supra*) and that his detention was not unreasonable (see Argument II, *supra*), then his arrest and search were legal.

Even if he were able to attack the search of the purse, his voluntary acknowledgment of the drugs in response to Mrs. Cox is sufficient to diminish the taint (see Argument II, *supra*) and establish an independent cause for the arrest.

CONCLUSION

Based upon the foregoing reasons and arguments the Commonwealth urges the Court to abolish "automatic standing" for possessory offenses and affirm the decision of the Supreme Court of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor Fox, counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on February 29, 1980, addressed to counsel for petitioner, Hon. J. Vincent Aprile II, Assistant Deputy Public Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601.

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